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VIA U.S. MAIL

Michael D. Harris
Acting Division Director
Land and Chemicals Division
U.S. EPA, Region 5
77 W. Jackson Blvd. (C-14J)
Chicago, IL 60604-3590

RE: Madison-Kipp Corporation, 201 Waubesa Street, Madison, WI
PCB Site Remediation
EPA ID: WID006071716
Response to December 14, 2017 Correspondence

Dear Mr. Harris:

Our Firm represents Madison-Kipp Corporation (Madison-Kipp and/or the Company). This is in response to your December 14, 2017 letter regarding the November 2017 Stipulation and Order for Judgment between the State of Wisconsin and the Company resolving the State of Wisconsin's 2012 enforcement action brought against the Company (the Order). As an initial matter, you should know that since the initial discovery of environmental conditions at the Company's facility resulting from chemical handling decades past, it has spent more than \$8.0 million in environmental investigation and remedial activities for soil and groundwater contamination at and surrounding the facility. This is in addition to a significant settlement of a putative class action brought against the Company by surrounding neighbors. The Company has addressed onsite and offsite soil impacts, resolved vapor intrusion concerns, defined the degree and extent of contaminants of concern in the groundwater and installed and is operating soil vapor extraction and groundwater recovery and treatment systems. The Company has acted responsibly and cooperatively with its environmental regulators to address chemical management that occurred decades ago.

Your letter indicates that EPA intends to review the Order so as to become familiar with its terms and to "determine what additional requirements may be necessary for remediation" under TSCA and the PCB regulations. Later your letter mentions concerns about potential contamination of drinking water resources indicating a desire to "assess changes to the monitoring well network." Although the Company is certainly willing to discuss these concerns with EPA representatives at a mutually convenient time, we believe it important to remind EPA of the positions the Company has advanced on these topics previously and of its jurisdictional boundaries as a backdrop to those anticipated discussions.



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TSCA Cleanup Requirements Do Not Apply to Madison-Kipp as the Company's Use of PCB-Containing Oil Predates 1978

As early as 2012, and on several occasions thereafter, Madison-Kipp has provided the Wisconsin Department of Natural Resources (WDNR) and U.S. Environmental Protection Agency (EPA) information confirming the release of polychlorinated biphenyls (PCBs) to the environment at the site predated the enactment of the Toxic Substances Control Act (TSCA).¹ Madison-Kipp's historical use of PCBs was discussed, in detail, during the August 27, 2014 meeting in Janesville, WI with representatives from WDNR, EPA and Madison-Kipp present. At all times the key facts have remained the same: 1) the Company's last confirmed purchase of PCB-containing hydraulic oil occurred in 1971 and 2) PCB-containing spent oil was historically used as a dust suppressant on the Company's parking lots until the lots were paved between August 1976 and November 1977.

Soil generated during on-site remedial efforts in 2012 was tested before off-site disposal and PCBs were detected in the composite soil sample. Madison-Kipp informed WDNR of the soil sample results in March 2012 and provided additional information and documents as requested by WDNR. During Madison-Kipp's thorough review of historical records, the Company identified that its last purchase of hydraulic oils containing PCBs was in 1971. In addition, during the Company's review of historical reports it was identified that potentially PCB-containing spent oil was historically used as a dust suppressant in the northeastern parking/loading dock area of the Company's parking lot. Dust suppression activities ceased no later than when the parking lot/loading dock areas were paved which, according to interviews with long-term employees, occurred between August 1976 and November 1977. These facts are addressed in a January 2013 expert report that was filed in the now-resolved *McHugh et al. v. Madison-Kipp Corporation et al.* matter in the U.S. District Court of the Western District of Wisconsin. That expert report relied on, in part, a sworn statement from a retired long-term Madison-Kipp employee with personal knowledge of the above referenced dust suppression activities.

Therefore, Madison-Kipp's thorough and good faith inquiry into the nature and origin of PCB contamination at the site establishes that any release of PCBs to the environment occurred prior to April 18, 1978. As such, consistent with TSCA and its implementing regulations, the site is presumed not to present an unreasonable risk of injury to health or the environment from exposure to PCBs at the site and cleanup up in accordance with 40 C.F.R. § 761.61 is not

¹ See, for example, May 9, 2012 letter to Ms. Linda Hanefeld, WDNR, with copy to Bradley Grams and Peter Ramanauskas, EPA Region V ("...based on MKC's internal investigations previously described to you, the release of PCBs to the environment predated both the enactment of TSCA and § 292.11, Stats...."); ARCADIS *Technical Justification – Polychlorinated Biphenyl (PCB)-Impacted Soils Beneath the Main Manufacturing Building*, Madison-Kipp Corporation, October 22, 2014, pp. 1, sent to WDNR, copy to Mr. Kenneth Zolnierczyk, EPA, by email dated October 22, 2014.



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required. 40 C.F.R. § 761.50(b)². Madison-Kipp has met its burden of establishing that any release of PCBs into the environment pre-dated 1978.

EPA Incorrectly Asserts, For the First Time, that the Madison-Kipp Site is a Type A Site Under the One Cleanup MDA

Since the discovery of PCBs in 2012, the Company has been working with the WDNR pursuant to the One Cleanup Program Memorandum of Agreement between WDNR and EPA (One Cleanup MOA) for more than five (5) years. In its December 14, 2017 letter, EPA asserts, for the first time, that the Madison-Kipp site is a "complex site (Type A) involving environmentally diverse or multiple complex issues" under the One Cleanup MOA. To our knowledge, until now, neither EPA nor WDNR have asserted that the Madison-Kipp site is a Type A site and indeed neither agency has acted as such. The Madison-Kipp site is technically distinguishable from the example of a Type A site included in the One Cleanup MOA guidance document (Fox River sediments), RR-786 (Nov. 2014), and EPA's failure to raise this issue before now, particularly when this was a specific topic of discussion during the August 27, 2014 in-person meeting, makes this assertion, at this point in time, highly suspect.

Revealingly, the parties have not been operating as if this were a Type A site. For example, the WDNR One Cleanup MOA guidance document notes that both the TSCA cleanup requirements and the NR 700 rule series are applicable to Type A sites and that "separate DNR and EPA review and approval processes outside the MOA coverage must be conducted" for Type A sites. However, individual approvals have neither been sought, nor obtained, from EPA for Madison-Kipp's work on the site. While there has been coordination between WDNR and EPA (consistent with Type B site coordination), Madison-Kipp has never sought separate EPA approvals. EPA has also never demanded separate reviews and approval; instead WDNR has always facilitated coordination with EPA consistent with a Type B site.

Finally, consistent with all of the Company's prior statements on this point, the Madison-Kipp site is a Type B site under the One Cleanup Program MOA. Madison-Kipp informed WDNR in 2012 that it would work collaboratively with WDNR under the One Cleanup MOA as a Type B site and the Company has acted consistent with a Type B classification since 2012. The site qualifies as a Type B site under the One Cleanup Program MOA because Madison-Kipp's thorough and good faith review determined that the date of release was before April 18, 1978, as per 40 C.F.R. § 761.50(b)(3), and there is no basis to conclude the site qualifies as a Type A site.

² Clean up is required, however, pursuant to Wisconsin's Hazardous Substance Spill Law, § 292.11, Wis. Stats., and is addressed by the injunctive relief contained in the Order.



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Madison-Kipp's Monitoring Well Network and Drinking Water Concerns

Your letter relates, for the first time to our knowledge, generalized concerns related to potential impacts to drinking water in the area of the Site. We are aware of no evidence that would support those concerns. We are also unclear if these concerns are related to the presence of PCBs, PCE or both. To the extent you are referring to shallow groundwater resources vis-à-vis PCBs entombed beneath the facility, this resource does not serve as the drinking water aquifer for the City of Madison and no private drinking water wells are allowed in the City. Also, shallow groundwater beneath the site is subject to an aquitard-confining geological unit known as the Eau Claire Formation. Note further that groundwater in the State of Wisconsin is under the exclusive jurisdiction of the WDNR, as delegated by the State Legislature. See *Lake Beulah Mgmt. Dist. v. Department of Natural Resources*, 2011 WI 54, 355 Wis. 2d 47, 799 N.W.2d 7, ¶ 39. Further, WDNR has also already concluded that PCBs have not dissolved in groundwater at the site. See enclosed July 20, 2016 memorandum to the City of Madison from WDNR.

To the extent your letter refers to the City of Madison's drinking water supply and PCE from the site, you should also be aware that WDNR agreed with an independent third-party consultant's conclusion that PCE from the site has not impacted the closest municipal water supply well (City of Madison Unit Well 8) and concluded that there is no technical reason for Madison-Kipp to install a deep monitoring well beneath the Eau Claire Formation. See enclosed November 22, 2017 letter to the Madison Water Utility from WDNR.

Madison-Kipp is now subject to the judicially enforceable Order entered into between the Company and the State of Wisconsin regarding required modifications to the Company's monitoring well network. The Company is legally required to move forward with such monitoring well network modifications within 90 days of entry of judgment and the Company intends to fully comply with the Order in all respects. As such, drilling activities consistent with the Order are scheduled to begin on January 15, 2018 according to the enclosed workplan prepared and submitted to WDNR.

Lastly, EPA's request for coordination concerning the Company's activities compelled by the Order at this time is ironic. The State and the Company attempted to obtain a review and input from EPA concerning the essential terms of its resolution prior to entering it. You should know that during an October 19, 2017 call with Associate Regional Counsel John Steketee and representatives of the State of Wisconsin and Madison-Kipp, Mr. Steketee expressed a reluctance to review and/or comment on any non-final settlement agreement between the State of Wisconsin and Madison-Kipp and, instead, offered that he could review an agreement *only after* it was entered into by the parties. So it is ironic that EPA would suggest the need for coordination regarding the activities required by the Order given its prior reluctance to input on the parties' final resolution of this matter.

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In summary, we welcome dialogue with EPA concerning its December 14, 2017 letter; however, we approach that dialogue from the perspective that (i) the Madison-Kipp site is a Type B site under the One Cleanup MOA and not subject to TSCA's clean up requirements because any release of PCB-containing oil would have pre-dated the TSCA jurisdictional date of April 18, 1978; (ii) that PCBs have not dissolved into groundwater beneath the facility and in any case this groundwater is under the exclusive jurisdiction of the State of Wisconsin; and lastly, (iii) there is no technical evidence of which we are aware that would suggest the City of Madison's drinking water is at risk from PCE originating from the Madison-Kipp Site. Site response activities will continue as required by the Order.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP


 David A. Crass

Enclosures

cc w/enc.: The Honorable Cathy Stepp, Regional Administrator
 David Ross, Wisconsin Department of Justice
 Jessica Kramer, Wisconsin Department of Justice
 Pat Stevens, Wisconsin Department of Natural Resources
 Mark Herman, Wisconsin Department of Natural Resources
 John Steketee, Office of Regional Counsel, EPA
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